IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL REVISION APPLICATION No. 520 of 2004
WITH
CRIMINAL REVISION APPLICATION No. 539 of 2004

For Approval and Signature:

HONOURABLE MR.JUSTICE DN PATEL

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1 Whether Reporters of Local Papers may be allowed to see the judgment ?

2 To be referred to the Reporter or not ?

3 Whether their Lordships wish to see the fair copy of the judgment ?

4 Whether this case involves a substantial question of law as to the interpretation of the constitution of India, 1950 or any order made thereunder ?

5 Whether it is to be circulated to the civil judge ?

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MOHANBHAI LALJIBHAI PATEL & 1 - Applicant(s)
Versus
DILIPBHAI DAYABHAI SARVAIYA & 1 - Respondent(s)

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Appearance in Criminal Revision Application No.520/2004:
MR PM THAKKAR FOR M/S THAKKAR ASSOC. for Applicant(s) : 1 - 2.MR SUCHITT D DAVE for Applicant(s) : 1 - 2.
Dilipbhai Dahyabhai, Party-in-person for Respondent No:1
MR KC SHAH, APP for Respondent(s) : 2,
Appearance in Criminal Revision Application No.539/2004:
MR NITIN M AMIN for Applicant(s) : 1 -3
MR KC SHAH, APP for Respondent No.1.
Dilipbhai Dahyabhai, Party-in-person for Respondent No:2

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CORAM : HONOURABLE MR.JUSTICE DN PATEL

Date : 01/08/2006

ORAL JUDGMENT

This Revision Application has been preferred against the order dated 7th July,2004 passed by the Learned Additional Sessions Judge, Junagadh in Criminal Revision Application No.48 of 2003, whereby the Revision Application preferred by respondent No.1 has been allowed and the order dated 7th May,2003 passed by the Learned Chief Judicial Magistrate,Junagadh has been quashed and set aside. The Learned Chief Judicial Magistrate, Junagadh accepted report under section 173(2) of Code of Criminal Procedure,1973 (popularly known as “C” Summary Report) filed by police on 6th January,2003 in pursuance of the investigation of the offence registered as C.R.No.I-12 of 2002 registered at Junagadh City “B” Division Police Station for the offences punishable under sections 418, 420, 423, 465, 467, 468, 471 read with 34 of the Indian Penal Code as there was no encroachment in the land bearing Survey No.214 (Final Plot No.70/2) by the present petitioners.

2. Learned Senior Counsel Mr.P.M.Thakkar for the applicants submitted that the complaint filed by the respondent no.1 is far away from truth. It is nothing but the reiteration of what is already pending before the Civil Court, Junagadh and for the very same subject matter viz. whether any unauthorized construction has

been made by the petitioner on Final Plot No.70/2 or not, several litigations have been pending before the Trial Court as well as before this Court. It is further submitted that the complaint is of the year 2002. Much prior in point of time, this matter has become subject matter of several litigations. First in point of time was in the year 1994 in Pesh Kadami Case No.2 of 1993-94, wherein an order dated 20th October,2003 was passed by the Collector, Junagadh that there is no encroachment and that there was a dispute for the ownership of the adjoining land between the State and the Nagarpalika, Junagadh. The Collector had passed an order dated 20th October,2003 in Revision Application No.2 of 1995, by which a detailed order has been passed for holding inquiry under section 37(2) of the Bombay Land Revenue Code,1879 and has come to the conclusion that the disputed land i.e. Survey No.214 (Final Plot No.70/2) is belonging to Junagadh Nagarpalika and not to the State of Gujarat. The whole complaint is for this very same land. The alleged encroachment was upon 297 sq.mtrs. of land. Civil Suit No.648 of 1992 is pending before the Court of Junior Civil Judge, Junagadh between the applicants and the Nagarpalika, Junagadh. Exh-5 application i.e. stay application has already been decided vide order dated 14th December,1992 in favour of the present applicants (original plaintiffs). The stay order was further carried in Appeal bearing Misc.Civil

Appeal No.17 of 1993 and the lower Appellate Court vide order dated 10th October,1994 dismissed the said Appeal. Thus, Exh-5 application – stay application has been finally decided in favour of original plaintiff-present applicants. The Civil Suit bearing No.648 of 1992 is still pending before the Learned Civil Judge (J.D.),Junagadh. Thus, learned counsel for the applicants submitted that in face of final order dated 20th October,2003 passed by the Collector by holding inquiry under section 37(2) of the Bombay Land Revenue Code,1879 coupled with the fact that stay had already been granted by the Learned Junior Civil Judge, Junagadh, the complaint filed by the respondent bearing C.R.No.I 12/2002 before Junagadh City “B” Division Police Station is nothing but reiteration of what is already decided by Collector vide order dated 20th October,2003 and it is a reiteration of what is already pending in Civil Suit No.648 of 1992 before the Civil Court, Junagadh and, therefore, “C” Summary Report was filed by Police, initially on 30th November,2002. Thereafter, order of further investigation was passed. It was further investigated and second time also, “C” Summary Report was filed on 6th January,2003 which was accepted by the Chief Judicial Magistrate, Junagadh vide order dated 7th May,2003. This aspect of the matter has not been properly appreciated by the Learned Additional Sessions Judge, Junagadh and, therefore, the order dated 7th July,2004

passed in Criminal Revision Application No.48 of 2003 deserves to be quashed and set aside.

3. Apart from this, with regard to what is decided by Collector and what is pending before the Civil Judge (Junior Division), Junagadh, one more litigation is pending viz. writ petition. A writ petition was preferred by some of the petitioners including the present respondent bearing Special Civil Application No.11910 of 2001, wherein para 3.4 of the Special Civil Application that there is no encroachment or unauthorized construction by the present applicants. This creates an estoppel on the part of the original complainant, who was one of the petitioners in said petition. Apart from this aspect, whether it tantamounts to estoppel or not, one fact is certain that the subject matter of complaint is also a subject matter of the writ petition, which is pending before this Court bearing Special Civil Application No.11910 of 2001. The same has been admitted and stay has been granted by this Court in favour of the petitioner. Present respondent no.1 is one of the petitioners in the Special Civil Application No.11910 of 2001. The Notice was issued for demolition by the Nagarpalika, Junagadh and a writ petition was preferred against the said Notice. Thus, before different forums, different is the say of the original complainant. Apart from the fact that there is no encroachment as per para

3.4 of the said petition, it cannot be denied that the facts and grievances, which are ventilated in the complaint bearing C.R.No.I-12 of 2002 filed before Junagadh City “B” Division Police Station are the subject matter of Civil Suit No.648 of 1992 and are subject matter of Special Civil Application No.11910 of 2001, which is already admitted and pending before this Court and, therefore also, “C” Summary Report filed by Police, even after second time investigation, is true and correct. Initially “C” Summary Report was filed on 30th November,2002. Further investigation order was passed. It was further investigated and the same conclusion was arrived at by the Investigating Agency and “C” Summary Report again filed on 6th January,2003 and it was accepted by the Learned Chief Judicial Magistrate, Junagadh vide order dated 7th May,2003.

4. Learned Senior Counsel for the applicants further submitted that whether the land bearing Survey No.214 (Final Plot No.70/2) belongs to the Government or Junagadh, Nagarpalika is also decided vide order dated 20th October,2003 in Special Civil Suit No.89 of 1970, which was between the Nagarpalika and the Government. Thus, by more than one orders, it has been finally decided that the adjoining land was never belonging to the Government of Gujarat. Government of Gujarat has not preferred any appeal against this order. As per an order

by Collector on 20th October,2003 and the decision given in Special Civil Suit No.89 of 1970, the impugned land is belonging to the Nagarpalika,Junagadh and against Junagadh Nagarpalika, petitioners have already preferred Civil Suit No.648 of 1992, wherein Exh-5 application has already finally decided in favour of the present applicants. Against the said order, Misc. Civil Appeal No.17 of 1993 was preferred which was dismissed by Learned Extra Assistant Judge, Junagadh on 10th October,1994. Thus, the whole complaint is nothing but a narration of the dispute, which is already pending and subjudice before the Learned Civil Judge (J.D.), Junagadh and the same subject matter is pending before this Court as stated hereinabove. This aspect of the matter has not been appreciated by the Learned Additional Sessions Judge, Junagadh and, hence, the order dated 7th July,2004 passed by Learned Additional Sessions Judge,Junagadh in Criminal Revision Application No.48 of 2003 deserves to be quashed and set aside.

5. Respondent no. 1 who appears as Party-in-person, through Dahyabhai – a father of the respondent No.1, submitted that the present applicants have encroached upon 297 sq.metres of land bearing survey No.214 (Final Plot No.70/2), which is situated on the northern side of Survey Nos.383 and 384. Survey Nos.383 and 384 belong to the present applicants, whereas Survey No.214 belongs to

the State of Gujarat and unauthorizedly a commercial complex namely “STAR Complex” has been constructed and the respondent has purchased a shop in the said complex. For that, a Criminal Complaint bearing C.R.No.I 12 of 2002 was filed before Junagadh City “B” Division Police Station, which was investigated and, thereafter, “C” Summary Report was filed on 30th November,2002. Learned Chief Judicial Magistrate passed an order for further investigation and thereafter, again “C” Summary Report was filed on 6th January,2003. Thus, even second time i.e. on 6th January,2003, “C” Summary Report was wrongly accepted by the Learned Judicial Magistrate, Junagadh on 7th May,2003 and thereafter, Criminal Revision Application bearing No.48 of 2003 was preferred by the respondent no.1 which was allowed by the Learned Additional Sessions Judge, Junagadh. It is further submitted by party-in-person that though the land bearing Survey No.214 was not belonging to the applicants, they unauthorizedly constructed over 297 sq.mtrs. of land which belongs to the Government of Gujarat. This fact has been suppressed by the present applicants while selling the shop, which the respondent no.1 has purchased. Thus, there was a cheating by fabrication of the document by present applicants. The order passed by Learned Additional Sessions Judge, Junagadh has correctly appreciated this aspect of the matter and, therefore, the order dated 7th July,2004 passed by Learned Additional Sessions Judge,

Junagadh in Criminal Revision Application No.48 of 2003 may not be interfere with by this Court.

6. Learned Additional Public Prosecutor for the State submitted that looking to the pending dispute before Learned Civil Judge (J.D.), Junagadh in Civil Suit No.648 of 1992, pending Special Civil Application No.11910 of 2001, which is already admitted by this Court and the order dated 20th October,2003 passed by the Collector upon holding inquiry under section 37(2) of the Bombay Land Revenue Code,1973, it appears that the whole dispute is a civil dispute in nature and whether there is any encroachment by the applicants or not is a subject matter pending before the Trial Court and one writ petition is already pending before this Court and, therefore, this was correctly accepted vide order dated 7th May,2003 by Chief Judicial Magistrate, Junagadh, who accepted “C” Summary Report. Once the Civil litigation is already pending before the Trial Court and before this Court about encroachment of the land in question and “C” Summary Report filed by the police is absolutely true and correct. This aspect of the matter has not been correctly appreciated in Revision Application preferred by original complainant (respondent No.1) by Learned Additional Sessions Judge,Junagadh in Criminal Revision Application No.48 of 2003 and, therefore, the order dated 7th July,2004 passed by the Learned Additional Sessions

Judge,Junagadh is dehors the facts and not tenable at law.

7. Having heard the learned counsel for both the sides and father of party-in-person, in my opinion, the order dated 7th July,2004 passed by the Learned Additional Sessions Judge, Junagadh in Criminal Revision Application No.48 of 2003 deserves to be quashed and set aside and the order dated 7th May,2003 passed by Learned Chief Judicial Magistrate, Junagadh deserves to be upheld for the following facts and reasons :-

(i) Looking to the complaint of the respondent-complainant bearing C.R.No.12 of 2002 filed before Junagadh City “B” Division Police Station, it appears that the complainant has ventilated his grievances about unauthorized construction on the land bearing Survey No.214 i.e. adjoining land and has pointed out that there was a cheating by the accused (present applicants), by fabricated documents. This complaint was investigated by police and looking to the nature of dispute and civil litigation, some of which have already been decided and some were pending, “C” Summary Report was filed under section 173(2) of the Code of Criminal Procedure,1973, initially on 30th November,2002. Learned Chief Judicial Magistrate, Junagadh passed an order for further investigation. Thus, the complainant was given one more

chance to give evidence against the present applicants. Further investigation was carried out. Once again, all facts were scrutinized by the Investigating Agency and again "C" Summary Report was filed on 6th January,2003 and in details, the facts have been pointed out as to what litigation is pending and how the dispute is civil in nature. The said report given under section 173(2) of Code of Criminal Procedure,1973, is at "Annexure-5" to the memo of the present Criminal Revision Application. Looking to this report, it appears that several litigations have been filed, decided and pending as to encroachment in question. The Learned Additional Sessions Judge has not properly appreciated this aspect of the matter and, therefore, there is an error apparent on the face of the record while passing order dated 7th July,2004 in Criminal Revision Application No.48 of 2003.

(ii) The Civil Suit No.648 of 1992 is already pending, which is filed by present applicants against Nagarpalika, Junagadh wherein it has been contended that there is no encroachment by the original plaintiffs i.e. present applicants. It is also contended in the said Civil Suit that the land in question does not belong to the Government but it belongs to the Nagarpalika. Thus, what is stated in the complaint about encroachment is a subject matter already pending before Learned Civil Judge (J.D.), Junagadh in Civil Suit No.648 of 1992. Exh-5

application i.e. stay application has been preferred by the original plaintiff (present applicants), which was decided in favour of plaintiff vide order dated 14th December,1992. This order below Exh-5 application in Civil Suit No.648 of 1992 was carried in Appeal bearing Misc.Civil Appeal No.17 of 1993 by Nagarpalika, Junagadh before Learned Extra Assistant Judge,Junagadh. This appeal was also dismissed vide order dated 10th October,1994. Thus, prima facie, there is no encroachment and that finding, is confirmed upto Lower Appellate Court. Suffice it to say that the subject matter in complaint is also the subject matter of Civil Suit No.648 of 1992 and is pending before Learned Civil Judge (J.D.), Junagadh.

(iii) Apart from one suit, which is already referred hereinabove, one writ petition bearing Special Civil Application No.11910 of 2001 is admitted and is pending before this Court, wherein also, same subject matter is involved. Junagadh Nagarpalika issued notice for demolition and certain petitioners preferred a writ petition contending that there is no encroachment or there is no unauthorized construction in commercial complex known as “STAR Complex”. This Court has admitted this petition and granted stay against the notice issued by the Nagarpalika, Junagadh. Thus, prima facie as per this Court, there is no encroachment or there is no

unauthorized construction. Surprisingly, the present applicant namely Dilipbhai is also one of the petitioners in Special Civil Application No.11910 of 2001, who is also a complainant of C.R.No.I 12 of 2002, the same is the subject matter in the complaint as well as in the writ petition. If a close look is given to para 3.4 of Special Civil Application No.11910 of 2002 i.e. there is an admission on the part of the original complainant or the present respondent no.1 that there is no unauthorized construction or there is no encroachment where the original complainant has purchased a shop. This, runs contrary to the complaint. Of course, this Court is not evaluating the contradiction in the complaint as well as in the aforesaid petition. Suffice it to say that “C” Summary Report filed by Police was correctly accepted by Learned Chief Judicial Magistrate and wrongly rejected by Learned Additional Sessions Judge, Junagadh in Criminal Revision Application No.48 of 2003 and, therefore, the order dated 7th July,2004 passed by Learned Additional Sessions Judge, Junagadh in Criminal Revision Application No.48 of 2003 deserves to be quashed and set aside.

(iv) Apart from the aforesaid Civil Suit and a writ petition, there is one more litigation, which has already been decided by holding inquiry under section 37(2) of the Bombay Land Revenue Code,1879. The Collector has passed an order on 20th September,1994 in Pesh Kadami Case

No.2 of 1993-94. This was also pertaining to encroachment in the adjoining land. Thereafter, Collector held an inquiry under section 37 of the Bombay Land Revenue Code,1879 and passed an order on 20th October,2003, wherein it has been decided that the land in question was never belonging to Government but it is belonging to the Nagarpalika, Junagadh. Thus, the say of the original complainant i.e. present respondent no.1 that there is encroachment in the Government land, finally decided by the Collector by holding an inquiry under section 37 of the Bombay Land Revenue Code. If at all, it is belonging to Nagar Palika, Junagadh as stated hereinabove, then already a Suit is pending between the applicants and Nagarpalika, Junagadh bearing Civil Suit No.648 of 1992 before Learned Civil Judge (J.D.),Junagadh. Thus, from the order dated 20th October,2003 passed by the Collector, it is crystal clear that the land in question was never belonging to the Government of Gujarat. This order has not been further challenged as per the facts narrated by the learned counsel in this matter. This aspect of the matter has not been rightly appreciated by the Learned Additional Sessions Judge, Junagadh.

(v) Apart from aforesaid litigations, still one more litigation was decided i.e. Special Civil Suit No.89 of 1970 between Nagarpalika, Junagadh and State of Gujarat. Much earlier in point of time, it has been held that land

in question was never belonging to Government of Gujarat but it was belonging to Nagarpalika, Junagadh. Thus, it was not open for the police to investigate when the decision is already taken by the Civil Court. Over and above this, the order dated 20th October,2003 has been passed by the Collector. The aforesaid Civil Suit No.89 of 1970 already reveals the fact that the ownership of the land in question was with the Nagarpalika, Junagadh and already a litigation between the Nagarpalika, Junagadh and present applicants is subjudice before the Learned Civil Judge (J.D.), Junagadh. If the aforesaid litigation are looked into closely, one fact is emerging on the surface that that there is no encroachment upon land in question. As the matter is pending before Learned Civil Judge (J.D.), Junagadh and as the matter is pending before this Court bearing Special Civil Application No.11910 of 2001 and certain aspects of the matter have already been decided by the Collector and also final order has been passed in Civil Suit No.89 of 1970, the Summary Report under section 173(2) of Code of Criminal Procedure,1973 was true and correct. Looking to this complexity of the Suits, which are pending, all disputes are civil in nature. “C” Summary Report was initially filed on 30th November,2002 whereupon, the Learned Chief Judicial Magistrate,Junagadh passed an order for further investigation. Further investigation was carried out again. The facts were scrutinized by investigating agency

and second time “C” Summary Report was filed on 6th January,2003 and the same was correctly appreciated and accepted by Learned Chief Judicial Magistrate, Junagadh vide order dated 7th May,2003.

8. As a cumulative effect of the aforesaid facts and reasons, the order dated 7th July,2004 passed by the Learned Additional Sessions Judge, Junagadh in Criminal Revision Application No.48 of 2003 is hereby quashed and set aside and the order dated 7th May,2003 below Exh.1 in connection with an offence registered with Junagadh City “B” Division Police Station being Cr.No.I-12 of 2002 passed by the learned Chief Judicial Magistrate, Junagadh is hereby confirmed. Rule made absolute.

CRIMINAL REVISION APPLICATION No. 539 of 2004 :

In this Revision Application, the same order dated 7th July,2004 passed by the Learned Additional Sessions Judge, Junagadh in Criminal Revision Application No.48 of 2003 is under challenge. By the judgment dated 1st August,2006 passed in Criminal Revision Application No.520 of 2004, the impugned order is quashed and set aside and therefore, this Criminal Revision Application is also allowed. Rule made absolute.

(D.N.PATEL,J)

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